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Criminal Procedure - Searches and Seizures: As Long as There Is Probable Cause to Make a Traffic Stop, Pretextual Arrests Are Constitutional

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CRIMINAL PROCEDURE—SEARCHES AND SEIZURES: AS LONG AS THERE IS PROBABLE CAUSE TO MAKE A TRAFFIC STOP, PRETEXTUAL ARRESTS ARE CONSTITUTIONAL

Whren v. United States, 116 S. Ct. 1769 (1996)

I. FACTS

On June 10, 1993, plainclothes police officers of the District of Columbia Police Department were patrolling for drug activity in Washington, D.C., in an unmarked car.[1] The officers became suspicious upon approaching a dark Nissan Pathfinder with temporary license plates stopped at an intersection.[2] The officers noticed two youthful occupants in the vehicle, with the driver looking into the lap of the passenger.[3] The Pathfinder remained stopped at the intersection for at least 20 seconds.[4] The police car made a U-turn behind the Pathfinder,[5] and as it did so, the truck turned quickly, without signaling, and took off at an "unreasonable speed."[6] The police followed the vehicle, and when the Pathfinder stopped at an intersection, the officers approached the vehicle.[7] As one of the officers drew near the driver side window, he observed two large plastic bags of what looked like narcotics in passenger Michael Whren's hands.[8] Whren and James L. Brown, the driver of the Pathfinder[9], were arrested and illegal narcotics were found in the truck.[10]

Following the arrest, Whren and Brown were charged with violating several federal drug laws.[11] Whren and Brown moved to suppress the narcotics found in the Pathfinder challenging the legality of the officers' actions that lead to the stop and seizure.[12] The two men contended that

1. Respondent's Brief at 2, Whren v. United States, 116 S. Ct. 1769 (1996) (No. 95-5841). The Supreme Court called it a "high drug area." Whren v. United States, 116 S. Ct. 1769, 1772 (1996).

2. *Whren*, 116 S. Ct. at 1772.

3. *Id.*; *see also* Petitioner's Brief at 2-3, *Whren* (No. 95-5841) (claiming that the officers' suspicions were aroused by the sight of "two young black men" in the Pathfinder).

4. Respondent's Brief at 2-3, *Whren* (No. 95-5841). The Court called this an "unusually long time." *Whren*, 116 S. Ct. at 1772.

5. Respondent's Brief at 3, *Whren* (No. 95-5841).

6. *Whren*, 116 S. Ct. at 1772.

7. *Id.*

8. *Id.* Whren and Brown, the other occupant of the vehicle, contended that, based on the testimony of one of the arresting officers, there was only one bag in Whren's hands. Petitioner's Brief at 8, *Whren* (No. 95-5841) (citing Tr. at 83, 92-94, 98-99, 102-03 (transcripts of the suppression hearing)).

9. *See* Respondent's Brief at 3, *Whren* (No. 95-5841) (identifying Brown as the driver of the vehicle).

10. *Whren*, 116 S. Ct. at 1772.

11. *Id.* The charges against Whren and Brown included violations of 21 U.S.C. § 844(a) and 21 U.S.C. § 860(a). *Id.*; *see also infra* note 16 (explaining the violations).

12. Respondent's Brief at 3, *Whren* (No. 95-5841). At the suppression hearing, Whren and Brown sought to exclude the evidence obtained as a result of the traffic stop and arrest. Petitioner's Brief at 3, *Whren* (No. 95-5841). In explaining the reasons for the stop, an officer testified at trial that

the stop was illegal because there had been no probable cause or reasonable suspicion to believe that they were engaged in illegal narcotics activity.[13] Whren and Brown further argued that the officers' alleged grounds for stopping and approaching the vehicle, to warn the driver about traffic violations, was a pretext to search for drugs.[14] The motion to suppress was denied by the district court, which found nothing to indicate that the officers acted contrary to normal traffic stop procedures.[15] Following a jury trial, Whren and Brown were convicted of various federal drug violations in the United States District Court for the District of Columbia.[16] The convictions were affirmed by the court of appeals.[17]

This comment will first focus on the two conflicting approaches that the federal courts of appeals have taken regarding pretext issues. Particular attention will be given to the United States Supreme Court's prevailing approach. Second, this comment will utilize a case analysis to focus on the approach the Court ultimately decided to utilize. Finally, this comment will examine how the North Dakota Supreme Court has dealt with pretext and the impact *Whren* may have in North Dakota.

II. LEGAL HISTORY

A. HISTORY OF THE PRETEXT DOCTRINE

In a pretextual arrest,[18] the justification offered by the government

the Pathfinder sped off quickly and did not signal. *Id.* at 5. The officer testified that he only pulled the vehicle over to find out why the driver was stopped so long at the intersection. *Id.* He further testified that "[t]he only circumstances that I would issue tickets—I'm a vice investigator; I'm not out there to give tickets—is for just reckless . . . driving, something that in my personal view would somehow endanger the safety of anybody who's walking around the street." *Id.* at 7. The officer also testified that "I wasn't going to issue a ticket to him at all[,] . . . that was not my intention[,] . . . [m]y intention was to pull him over and talk to him [about the full time and attention and speed violations]." *Id.* (last alteration in original).

The Petitioners contended in their brief that it is against department policy to give oral warnings and that the officer violated this provision. *Id.* at 6-7 n.8 (quoting D.C. Police Order 303(I)(A)(2)(b), which provides that oral warnings should be given only under "extreme circumstances").

13. *Whren*, 116 S. Ct. at 1772.

14. *Id.*; *see also supra* note 12 (discussing petitioners' arguments concerning the officer's reasons for making the stop).

15. *Whren*, 116 S. Ct. at 1772.

16. Respondent's Brief at 2, *Whren* (No. 95-5841). Whren and Brown were convicted of possessing crack cocaine, a violation of 21 U.S.C. § 841(a)(1); possession of crack cocaine within 1,000 feet of a school with the intent to distribute, a violation of 21 U.S.C. § 860(a); possession of marijuana, a violation of 21 U.S.C. § 844(a); and possession of phencyclidine (PCP), a violation of 21 U.S.C. § 844(a). *Id.*

17. *Whren*, 116 S. Ct. at 1772. The court of appeals held, with respect to the suppression issue, that "regardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstance *could have* stopped the car for the suspected traffic violations." United States v. Whren, 53 F.3d 371, 375 (D.C. Cir. 1995).

18. In this Comment, a *pretextual arrest* refers to "an instance where a police officer makes an arrest for an ostensibly proper reason 'but is in fact arresting in order to conduct a search incident to arrest for which there is no independent probable cause.'" Laurie A. Buckenberger, Comment,

for the arrest is a sufficiently legal one, but in fact the arresting officer made the traffic stop to search the person for another reason, one which is legally insufficient to make the arrest in the first place.[19] The standard to apply in determining the constitutionality of pretextual arrests has divided the federal circuit courts of appeals.[20] Problems arise due to the uncertain and inconsistent guidance the United States Supreme Court has offered concerning pretextual arrests.[21]

Pretextual Arrests: In United States v. Scopo the Second Circuit Raises the Price of a Traffic Ticket (Considerably), 61 BROOK. L. REV. 453, 453 n.2 (1995) (quoting John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70, 78 n.36 (1982)). Also, as used in this Comment, "the term does not encompass 'fabricated pretexts,' which purportedly occur when 'the government offers a justification (for the arrest) that is not the true reason for the police activity and, in fact, is legally insufficient because it is not supported by the facts.'" *Id.* (quoting Edwin J. Butterfoss, *Solving the Pretext Puzzle: The Importance of Ulterior Motives and Fabrication in the Supreme Court's Fourth Amendment Pretext Doctrine*, 79 KY. L.J. 1, 6 (1991)). An example of a fabricated pretext would be the invention of a traffic offense by a police officer after the arrest to justify the arrest and any search that followed. *Id.* The pretext doctrine would not apply in such a case since the officer does not have the requisite probable cause to arrest. *Id.* (citing United States v. Ferguson, 8 F.3d 385, 397-98 (6th Cir. 1993) (en banc) (Jones, J., dissenting)). Since there is no probable cause, the arrest is invalid and there is no authority to conduct a search following such arrest. *Id.* (citing James B. Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 MICH. J. L. REF. 639, 643 (1985)).

19. *See* John M. Burkoff, *The Pretext Search Doctrine: Now You See it, Now You Don't*, 17 MICH. J. L. REF. 523, 523 (1984) (discussing pretext arrests and searches). Another writer defines pretext searches and seizures as "those undertaken by police officers at least in part for reasons other than the justification later offered by the government." Butterfoss, *supra* note 18, at 1.

For example, a police officer may tail someone suspected of a crime, but lack the requisite probable cause to effectuate a stop and arrest. Once, however, the officer "catches" the motorist in a traffic violation, the officer then has probable cause to stop and arrest the person on charges unrelated to the traffic stop if the officer discovers the illegal activity she expected in the first place. This is a pretextual stop and arrest.

20. *See infra* part II.B (explaining the two standards).

21. Buckenberger, *supra* note 18, at 457. Buckenberger discusses three areas of Supreme Court law. *Id.* at 456-57. The first is the broad expansion by the Supreme Court of "the permissible scope of warrantless searches incident to arrests." *Id.* The second area is the indication by the Court of a concern with the expansion of this scope in providing police with "an incentive to arrest solely for the purpose of conducting a search." *Id.* at 457. And the third area of concern is the wholly objective analysis laid down by the Court "for determining whether [F]ourth [A]mendment activity is reasonable." *Id.*

The Court has stated that searches conducted without a warrant are unreasonable. *See* Katz v. United States, 389 U.S. 347, 357 (1967) (holding that searches without warrants are subject to a few, special exceptions). A frequently used exception invoked by the Court is that police are allowed to search a person they have arrested and certain limited areas within that person's control. Buckenberger, *supra* note 18, at 457 (citing Weeks v. United States, 232 U.S. 383, 392 (1914) (establishing the exception that allows police to search a person incident to a lawful arrest) and Carroll v. United States, 267 U.S. 132, 162 (1925) (recognizing for the first time that police have the authority to search the place of a person arrested)). There are several other exceptions. *See id.* at 457 n.18 (describing the other "established and well-delineated exceptions" to the warrant requirement); *see also* James R. Salisbury, Comment, *Towards More Effective Law Enforcement—Utilization of Collective Knowledge to Sustain a Reasonable Suspicion Inquiry:* State v. Miller, 71 N.D. L. REV. 797, 800 n.21 (1995) (listing the exceptions as including: "investigatory detentions, warrantless arrests, searches incident to a valid arrest, seizure of items in plain view, exigent circumstances, consent searches, searches of containers, inventory searches, border searches, searches at sea, administrative searches, and searches in which the special needs of law enforcement make the probable cause requirement impracticable") (citing *Twenty-Second Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1991-1992. Part 1 of 4*, 81 GEO. L.J. 853, 877 (1993)). Buckenberger points out that one commentator feels that the warrant requirement has been virtually removed by the often invoked exceptions. Buckenberger, *supra*, (citing Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127,

One of the earliest United States Supreme Court cases mentioning pretext was *United States v. Lefkowitz*,[22] in which the Court stated that "[a]n arrest may not be used as a pretext to search for evidence."[23] Since some commentators disagree on whether *Lefkowitz* really stood for the proposition that a pretextual arrest would be unconstitutional,[24] a case that is more helpful in understanding the argument is *United States v. Abel*.[25] In *Abel*, Immigration and Naturalization Officers, acting on an administrative warrant[26] for deportation, arrested Abel, and in a search incident to the arrest uncovered evidence of espionage.[27] Abel sought to suppress the evidence by alleging that the government's arrest had been pretextual.[28] The Supreme Court explained that if there had been a pretext for the arrest, the result would have been a violation of Abel's constitutional rights.[29] However, the Court found the arrest valid and ruled out pretext because the arrest followed standard F.B.I. procedures.[30]

131 n.19 ("noting that warrantless searches have become the rule rather than the exception and that in 1966, 171,288 arrests were made by New York city police with only 3,897 warrants obtained")).

22. 285 U.S. 452 (1932).

23. United States v. Lefkowitz, 285 U.S. 452, 467 (1932). *Lefkowitz* dealt with the search of an entire office incident to an arrest, which the Court found to be unreasonable. *Id.* at 463-467. *Lefkowitz* is little help in understanding what a pretext arrest or search is because the warrantless search of the office where defendant was arrested was for no other purpose than to search for evidence of the crime for which he was arrested. 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.4(e), at 116 (3d ed. 1996); *see also* Haddad, *supra* note 18, at 654 (suggesting that the language in *Lefkowitz* is only dicta). Furthermore, Haddad points out that Professor Burkoff is the only person who has suggested that the Court in *Lefkowitz* was condemning a search that was otherwise legal. *Id.*

24. *See* Haddad, *supra* note 18, at 654 (discussing Professor Burkoff's suggestion that the Court was condemning a pretextual arrest). As Haddad points out, Professor Burkoff's "suggestion stems from a single sentence of dictum, at the end of the opinion, that declares that police officers should not use arrests as pretexts for searches." *Id.* (citing *Lefkowitz*, 285 U.S. at 467).

25. 362 U.S. 217 (1960).

26. *See* Whren v. United States, 116 S. Ct. 1769, 1773 n.2 (1996) (explaining that an administrative inspection is an inspection of a business by authorities responsible for enforcement of a regulatory scheme, like an unannounced inspection of a business for compliance with safety and health standards).

27. United States v. Abel, 362 U.S. 217, 218 (1960).

28. *Id.* at 225-26 (explaining that Abel sought to attack the admissibility of the evidence because the INS warrant was a "pretense and sham" for the real reason, a search for espionage evidence).

29. *Id.* at 226. The Court observed that "[w]ere this claim justified by the record, it would indeed reveal a serious misconduct by law-enforcing officers. The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts." *Id.*

30. *Id.* at 232-33. An understanding of the important facts in *Abel* led one commentator to conclude that there was considerable cooperation between the FBI and the INS. LAFAVE, *supra* note 23, at 116-17. From all the facts, LaFave concluded that the strongest interest of the government in *Abel* involved his espionage activity. *Id.* at 117. Presumably, the reason the agents went to Abel's motel room, to investigate pursuant to INS regulations, was a pretext for the FBI espionage investigation. Thus, *Abel* presents another situation where the motives of officers do not require suppression. *Id.* That situation is one "where, even assuming that intent or motivation was the dominant one in the particular case, the Fourth Amendment activity undertaken is precisely the same as would have occurred had that intent or motivation been entirely absent from the case." *Id.*

Professor Haddad agrees with this view and states that the language in *Abel* concerning pretextual arrests has not carried much weight. Haddad, *supra* note 18, at 658. Haddad observes that

In 1978, the United States Supreme Court decided *Scott v. United States*,[31] and established that an objective, not subjective approach to analyzing police activity should be employed.[32] *Scott* involved a wiretapping operation by government agents over a one month period.[33] The agents did not minimize, pursuant to a court order, the number of conversations they intercepted.[34] The district court suppressed the intercepted conversations, finding the agents' actions unreasonable since they knew they were violating the minimization requirement.[35]

The Supreme Court disagreed and held that the constitutionality of police activity rests on an objective assessment of an officer's actions.[36] The failure of the agents to minimize did not diminish the legality of their actions.[37] Furthermore, the Supreme Court agreed with the government's contention that "[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional."[38] An objective standard is therefore utilized in analyzing police activity, but there has been disagreement in approach.[39]

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this dictum in the majority opinion suggests that evidence might be excluded by the Court if the police act properly within the Fourth Amendment, but do so for a purpose which is improper. *Id.* at 657-58. However, "neither in *Abel*, where the claim of pretext was rather compelling, nor in any other case has the Supreme Court acted in accordance with this suggestion." *Id.* at 658.

31. 436 U.S. 128 (1978).

32. Scott v. United States, 436 U.S. 128, 135 (1978).

33. *Id.* at 130-32 (stating that the wire-tapping took place from January 24 until February 24 of 1970). Under a federal statute, government agents were required to conduct the wiretap so as to minimize the interception of communications that were otherwise unrelated to the purpose of the operation. *Id.* at 130 (citing 18 U.S.C. § 2518(5) (1976)). The agents, however, intercepted all the phone conversations. *Id.* at 130-31. Many of the conversations intercepted were in no way related to narcotics activity, in fact, only 40% were. *Id.* at 132. An agent testified that the only conversations not intercepted were those that took place when the wire tap was not operating because the agents had tapped into the wrong line. *Id.* at 133 n.7.

34. *Id.* at 132. Minimization was required under a court order authorizing the wire tap. *Id.* at 130-31.

35. *Id.* at 132-34. The district court looked at the number of conversations that were intercepted in relation to the number that were actually drug related, and suppressed the intercepted conversations along with all other evidence obtained as a result. *Id.* at 132.

36. *Id.* at 136.

37. *Id.* at 141 (agreeing with the court of appeals regarding the lack of minimization). The appellate court held that the analysis should be based on the reasonableness of the agents in their attempt to fulfill the purpose of the wiretap with the information that was available to them at the time. United States v. Scott, 504 F.2d 194, 198 (D.C. Cir. 1974).

38. *Scott*, 436 U.S. at 136. The Court stated that "almost without exception" an evaluation of the legality of Fourth Amendment activities involves "an objective assessment of an officer's actions in light of the facts and circumstances then known to him." *Id.* at 137. The Court further held that "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Id.* at 138.

39. Matthew S. Crider, Case Note, 36 S. TEX. L. REV. 629, 639 (1995). A subjective analysis has been used in the past. *Id.* at 637 (citing United States v. Smith, 802 F.2d 1119, 1124 (9th Cir. 1986)). Now, however, courts in the United States unequivocally reject analyzing pretext claims based on subjective intent. *See id.* at 637 n.47 (noting all courts that utilize an objective analysis).

B. TWO APPROACHES TO PRETEXT ANALYSIS

In analyzing pretext claims objectively there have been two approaches: the *wholly objective approach* and the *modified objective approach*.[40]

1. The Wholly Objective Approach

This approach determines whether an officer was legally authorized to perform the actions which lead to the arrest.[41] The typical view is that "so long as the police are doing no more than they are legally permitted and objectively authorized to do, an arrest is constitutional."[42] Several circuits have held that a traffic stop is justified, even where pretext is alleged, if the arresting officer *could have* stopped the vehicle.[43] Nine circuits, including the D.C. Circuit, employ the *could have* test.[44]

2. The Modified Objective or "Reasonable Officer" Approach

In contrast, the modified objective approach[45] seeks to determine whether a reasonable officer under similar circumstances would have made the stop absent the invalid purpose.[46] This test has been applied by the Ninth and Eleventh Circuits.[47] These circuits have held that a traffic stop is justified only if "under the same circumstances a reasonable officer *would have* made the stop in the absence of the invalid purpose."[48] The Supreme Court had not yet dealt with the issue of a pretext

40. *Id.* at 639 n.50.

41. *Id.*

42. *Id.* (quoting United States v. Trigg, 878 F.2d 1037, 1041 (7th Cir. 1989)).

43. *See, e.g.*, United States v. Scopo, 19 F.3d 777, 782-84 (2d Cir. 1994) (holding that "an objective test should be applied to issues surrounding the constitutionality of searches and seizures under the Fourth Amendment").

44. Petitioner's Brief at 11 n.13, Whren v. United States, 116 S. Ct. 1769, (1996) (No. 95-5841). The eight circuits who follow some form of the *could have* test are the second, third, fourth, fifth, sixth, seventh, eighth, and tenth. *See id.* (citing United States v. Botero-Ospina, 71 F.3d 783, 787 (10th Cir. 1995) (en banc); United States v. Johnson, 63 F.3d 242, 247 (3d Cir. 1995); *Scopo*, 19 F.3d at 782-84; United States v. Ferguson, 8 F.3d 385, 389-91 (6th Cir. 1993) (en banc); United States v. Hassan El, 5 F.3d 726, 729-30 (4th Cir. 1993); United States v. Cummins, 920 F.2d 498, 500-01 (8th Cir. 1990); *Trigg*, 878 F.2d at 1039; United States v. Causey, 834 F.2d 1179, 1184 (5th Cir. 1987) (en banc)).

45. Crider, *supra* note 39, at 641. This is also known as the *would have* or *reasonable officer* approach.

46. *Id.* (citing United States v. Guzman, 864 F.2d 1512, 1515 (10th Cir. 1988)).

47. *See* United States v. Cannon, 29 F.3d 472, 475-76 (9th Cir. 1994) (stating that "courts should inquire whether a reasonable officer 'would have' made the stop"); United States v. Smith, 799 F.2d 704, 709 (11th Cir. 1986) (stating that an objective analysis should be applied and the *would have* test should be utilized).

48. *Smith*, 799 F.2d at 709.

traffic arrest and search head on until *Whren*.[49]

III. CASE ANALYSIS

In *Whren v. United States*,[50] the Supreme Court addressed the constitutionality of a pretextual traffic stop and arrest.[51] The Court emphasized that the constitutional reasonableness of a traffic stop does not depend upon the actual motives of police officers involved in the stop.[52]

Justice Scalia delivered the opinion of a unanimous Court.[53] He began the Court's analysis by recognizing the limits placed on the government by the Fourth Amendment.[54] The Court emphasized that even the temporary detention of a person for purposes of a traffic stop by police is a *seizure* of *persons* within the meaning of the Fourth Amendment.[55] Stopping an automobile is therefore subject to the constitutional requirement that it be reasonable under the circumstances.[56] And, an officer's decision to stop an automobile will be reasonable only if the officer has probable cause to believe the motorist has violated a traffic law.[57]

49. *See* Crider, *supra* note 39, at 636-37 n.44 (quoting *Trigg*, 878 F.2d at 1039 ("[T]he Court has not defined the contours of a pretextual arrest and has never excluded evidence as the product of a pretextual seizure") and *Guzman*, 864 F.2d at 1517 ("[T]he Court has never explicitly defined the contours of the pretext doctrine")).

50. 116 S. Ct. 1769 (1996).

51. Whren v. United States, 116 S. Ct. 1769, 1771-72 (1996). The Court stated that:

> In this case we decide whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws.

Id.

52. *Id.* at 1774.

53. *Id.* at 1772.

54. *See id.*

55. *Id.* (citing Delaware v. Prouse, 440 U.S. 648, 653 (1979), United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976), and United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)). The detention must be reasonable even if it is "for a brief period and for limited a limited purpose." *Id.*

56. *Id.*

57. *Id.* (citing *Prouse*, 440 U.S. at 659, and Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977) (per curiam)). Probable cause is necessary in order for police to effectuate an arrest. *See* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.1, at 5 (3d ed. 1996) (explaining that a warrantless arrest is permissible upon "reasonable grounds to believe"). Under the Fourth Amendment the police may not make an arrest or search unless they have probable cause to do so. *Id.* LaFave further explains that the "reasonable grounds to believe" language states the constitutional standard of probable cause. *Id.* (citation omitted). Probable cause, however, cannot be established simply based on what an arresting officer believes. *See* Beck v. Ohio, 379 U.S. 89, 97 (1964) (holding that a "good faith" belief on the behalf of officers is not enough for an arrest).

The protections of the Fourth Amendment would mean nothing if subjective intent alone were enough, and citizens would be "secure in their persons, houses, papers, and effects," only at the subjective discretion of police officers. Terry v. Ohio, 392 U.S. 1, 22 (1968) (quoting *Beck*, 379 U.S. at 97). Therefore, an objective standard is used to test for probable cause. *See* 2 LAFAVE, *supra*, § 3.2(b), at 33 (stating that the probable cause test is "an objective one").

Petitioners agreed that the police had probable cause to stop their vehicle for certain traffic violations.[58] The Petitioners argued, however, that "in the unique context of civil traffic regulations" something more than probable cause should be required.[59] Because of the pervasive presence of automobiles in society, Petitioners felt it would be easy for an officer to invariably find any given motorist in a minor violation of the law.[60] To avoid this problem, the Petitioners contended that the constitutional test for traffic stops should not be the one applied by the court of appeals,[61] but rather, whether a reasonable officer *would have* made the stop.[62]

The Petitioners argued that Court precedent supported the *would have* standard.[63] To support this argument the Petitioner's contended that case law has consistently spoken out against pretextual searches.[64] The Petitioners reminded the Court that an inventory search[65] by police officers must not be a guise for looking for other incriminating evidence,[66] that the Court had upheld an inventory search after finding there had been no investigation pursuant to the inventory search,[67] and that the Court upheld the constitutionality of a warrantless administrative inspection on the grounds that there did not appear to be any ulterior

58. *Whren*, 116 S. Ct. at 1772. The trial court found probable cause for the traffic stop "based on three civil traffic infractions described in Officer Soto's testimony: Mr. Brown failed to give 'full time and attention' to his driving[,] . . . turned without signaling[,] . . . and drove away at an 'unreasonable' speed." Petitioner's Brief at 11-12, *Whren* (No. 95-5841) (citing Whren v. United States, 53 F.3d 371, 376 (D.C. Cir. 1995).

59. *Whren*, 116 S. Ct. at 1773. Petitioners argued that the unlimited reasons for which an officer can make a stop for technical traffic violations give police too much discretion and is really no limit at all. Petitioner's Brief at 13, *Whren* (No. 95-5841). It was further argued that this discretion gives police license to stop a vehicle for infractions like "[a] string hanging from the rearview mirror, a tire touching the shoulder stripe, a lane change signal a moment too brief, or a pause at a stop sign to look at a map." *Id.*

60. *Whren*, 116 S. Ct. at 1773. The Petitioners felt the number of autos in society tempts police to use traffic stops for purposes of investigation where "no probable cause or even articulable suspicion exists." *Id.*

61. *See Whren*, 53 F.3d at 375-76 (holding that the intent of officers is not important as long as an officer *could have* made the stop).

62. *Whren*, 116 S. Ct. at 1773.

63. Petitioner's Brief at 30, *Whren* (No. 95-5841).

64. *Id.*

65. *See Whren*, 116 S. Ct. at 1773 n.1 (citing South Dakota v. Opperman, 428 U.S. 364, 369 (1976)). An inventory search is a search of property that has been seized and detained lawfully, to ensure that the property is not dangerous, to ensure that valuables are secured, and to protect against false claims of damage or loss. *Id.*

66. *Id.* at 1773 (citing Florida v. Wells, 495 U.S. 1, 4 (1990)). The Petitioners relied on arguments, concerning this and other cases, made by Professor Burkoff in several articles on the subject of pretext. *See* Haddad, *supra* note 18, at 640 n.6 (listing several articles written by Professor Burkoff).

67. *Whren*, 116 S. Ct. at 1773 (citing Colorado v. Bertine, 479 U.S. 367, 372 (1987)). The Court said that "in approving an inventory search, we apparently thought it significant that there had been 'no showing that the police, who were following standard procedures, acted in bad faith or for the sole purpose of investigation'" *Id.* (quoting *Bertine*, 479 U.S. at 372).

motives by officers in their search.[68] The Court in *Whren* found these arguments to be of little weight[69] because the cases cited involved the *absence* of probable cause.[70]

The Petitioners also relied on statements in *Colorado v. Bannister*,[71] which implied that the stop would be illegal if it were pretextual.[72] The Court once again, however, dismissed this argument by finding that the quotes from *Bannister* were taken out of context by the Petitioners.[73] The Court summed up this portion of the opinion by observing that Petitioners could find no case law to support their position.[74]

After refusing to find any basis of support in the Petitioners' analogies, the Court discussed precedent contrary to the Petitioners' position.[75] The Court observed that the otherwise valid boarding of a vessel by customs officials was not invalidated because the agents were accompanied by a state trooper and were acting pursuant to a tip.[76] The Court flatly dismissed the notion that any ulterior motives by the government agents would strip them of their legal justification.[77] The

68. *Id.* (citing New York v. Burger, 482 U.S. 691, 716-17 n.27 (1987)). The Court in *Burger* found that the search was not, apparently, "a 'pretext' for obtaining evidence of . . . [a] violation of . . . penal laws." *Burger*, 482 U.S. at 716-17 n.27.

69. *Whren*, 116 S. Ct. at 1773. Justice Scalia summarily dismissed these cases by stating that "only an undiscerning reader would regard these cases as endorsing the principle that ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that a violation of law has occurred." *Id.*

70. *Id.* The Court explained that the quoted statements in the case only explain that searches for the purpose of administrative inspection and inventory do not require probable cause, whereas probable cause is still required in searches that "are *not* made for those purposes." *Id.* (citing *Burger*, 482 U.S. at 702-03, and *Bertine*, 479 U.S. at 371-72). In *Whren*, there was probable cause to stop based on the traffic violations committed by the Petitioners. *See id.* at 1772-73 (describing the violations of traffic laws by petitioners). Thus, any arrest subsequent to the stop was valid.

71. 449 U.S. 1 (1980) (per curiam); *see also Whren*, 116 S. Ct. at 1773 (observing that the two cases, *Whren* and *Bannister*, are similar). In *Bannister*, the traffic stop was precursory to a plain-view sighting and arrest on charges unrelated to the actual reason for the stop. Colorado v. Bannister, 449 U.S. 1, 3-4 (1980) (per curiam).

72. *Whren*, 116 S. Ct. at 1773 (citing *Bannister*, 449 U.S. at 4 n.4).

73. *Id.* The Court stated that the language in *Bannister* relied on by Petitioner's was "dictum *at most*." *Id.* And furthermore, the language

> demonstrate[d] that the Court [in *Bannister*]. . . found no need to inquire into the question now under discussion; not that it was certain of the answer. And it may demonstrate even less than that: if by "pretext" the Court meant that the officer really had not seen the car speeding, the statement would mean only that there was no reason to doubt probable cause for the stop.

Id. Moreover, the Court stated that Petitioners' reliance on the per curiam *Bannister* opinion as an indication of reversal of prior law was erroneous. *Id.* at 1774.

74. *See id.* (explaining that Petitioners' problem is not just a lack of support, but clearly contrary case law).

75. *Id.* "Not only have we never held, outside the context of inventory search or administrative inspection, . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary." *Id.*

76. *Whren*, 116 S. Ct. at 1774 (citing United States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3 (1983)).

77. *Whren*, 116 S. Ct. at 1774.

Court then pointed to *United States v. Robinson*,[78] where it had held that a traffic stop and arrest would not be invalid because it was pretextual.[79] Finally, the Court discussed *Scott v. United States*, and its *subjective intent* language.[80] The Court found that these cases foreclosed any argument that the reasonableness of a traffic stop under the Constitution depends upon the subjective intent of police officers.[81]

The Court then discussed the objective standard of reasonableness that the Petitioners suggested,[82] and determined that although the Petitioners' standard is framed empirically, it is driven by subjective considerations.[83] The whole purpose of the Petitioners' standard is the prevention of arrests that utilize the traffic code for ulterior purposes.[84] Instead of a subjective standard, the Petitioners would have the Court ask whether it is plausible to believe the officer had the proper state of mind based on general police practices and guidelines.[85] The Court reasoned that it would be easier to figure out the subjective intent of an individual officer than to examine the collective view of all law enforcement.[86]

78. 414 U.S. 218 (1973).

79. *Whren*, 116 S. Ct. at 1774 (citing United States v. Robinson, 414 U.S. 218, 221, n.1 (1973)). In *Robinson*, the Court stated that a police officer had reason to believe that the driver of the vehicle was operating it without a valid permit. *Robinson*, 414 U.S. at 220. The officer pulled the vehicle over and "informed respondent that he was under arrest for 'operating after revocation and obtaining a permit by misrepresentation.'" *Id.* When searching the respondent, the officer found a crumpled up cigarette pack that contained heroine. *Id.* at 223. Respondent urged that the officer "may have used the subsequent traffic violation arrest as a mere pretext for a narcotics search which would not have been allowed by a neutral magistrate had [the officer] sought a warrant." *Id.* at 221 n.1. The Supreme Court held, however, that an arrest based upon probable cause is a reasonable intrusion under the Fourth Amendment, and any search incident to such arrest requires no further justification. *Id.* at 235.

80. *Whren*, 116 S. Ct. at 1774 (citing Scott v. United States, 436 U.S. 128, 138 (1978)); *see also supra* notes 31-38 and accompanying text (discussing the *Scott* decision).

81. *Whren*, 116 S. Ct. at 1774. The Court reinforced their position by explaining that subjective intent does not have a part in "ordinary, probable-cause Fourth Amendment analysis." *Id.*

82. *Id.* The Petitioner's proposed standard for determining reasonableness was "whether the officer's conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given." *Id.*

83. *Id.*

84. *Id.* The Court pointed out that "Petitioners' proposed standard may not use the word 'pretext,' but it is designed to combat nothing other than the perceived 'danger' of the pretextual stop, albeit only indirectly and over the run of cases." *Id.*

85. *Id.* The Petitioners based their claims on the premise that a reasonable officer would not have stopped the Pathfinder because District of Columbia police regulations allow plainclothes officers to enforce traffic laws only in limited situations. *Id.* at 1775. These police regulations permit "plainclothes officers in unmarked vehicles to enforce traffic laws 'only in the case of a violation that is so grave as to pose an *immediate threat* to the safety of others.'" *Whren*, 116 S. Ct. at 1775. The Court asked "[w]hy one would frame a test designed to combat pretext in such a fashion that the court cannot take into account *actual and admitted pretext* is a curiosity that can only be explained by the fact that our cases have foreclosed the more sensible option." *Id.* at 1774-75.

86. *Id.* The Court explained that police practices vary too much from city to city to set any reasonable standard by which an officer's actions could be judged. *Id.* The Court stated that police manuals and standard procedure guidelines provide some assistance to an objective analysis, "ordinarily one would be reduced to speculating about the hypothetical reaction of a hypothetical constable—an exercise that might be called virtual subjectivity." *Id.* Furthermore, the Court stressed that Petitioners' supposed basis for invalidating the stop may not be found in other jurisdictions that

The Court also dismissed the Petitioners' argument that adherence to these practices by police is an objective way of discovering pretext.[87] Petitioners relied on *Abel v. United States*,[88] but the Court in *Whren* pointed out that it did not hold in *Abel* that a pretext search and seizure would invalidate an arrest in which probable cause is present.[89] Further, the Court admonished, that *Abel* is directly inconsistent with views the Court expressed in later cases.[90]

The Court next turned to the Petitioners' arguments concerning balancing factors present in Fourth Amendment analysis.[91] The Court saw the Petitioners' argument as a possible elaboration on the reasonable officer test.[92] The balancing that the Petitioners put forward would not support a stop and investigation by plainclothes police officers in an unmarked car.[93] Petitioners contended that an investigation by plainclothes police is only a minimal advancement of the government's interest concerning traffic safety and may infringe upon motorist's rights by making them more confused and alarmed.[94] The Petitioners relied upon *Delaware v. Prouse*,[95] in which the Court found that discretionary spot checks are not justified under the Fourth Amendment since there are alternative ways to enforce highway safety.[96] The Court in *Whren* distinguished *Prouse* pointing out that in *Prouse* there was an absence of probable cause.[97] The Court concluded that where probable cause to stop exists, it is only necessary to perform a "balancing"

have different policies than the D.C. Police. *Id.*

87. *Id.* The Court dismissed this argument because Petitioners cited no direct authority for their position, but only dicta from two cases. *Id.*

88. *See supra* notes 25-30 and accompanying text (discussing the *Abel* decision).

89. *Whren*, 116 U.S. at 1775. The Court felt that "it is a long leap from the proposition that following regular procedures is some evidence of lack of pretext to the proposition that failure to follow regular procedures *proves* (or is an operational substitute for) pretext." *Id.*

90. *Id.* (citations omitted).

91. *Id.* at 1776.

92. *Id.* The Petitioners would have the Court do a balancing test that they feel is inherent in the Fourth Amendment. *Id.* Such a test would require the Court "to weigh the governmental and individual interests implicated in a traffic stop such as [the one] here." *Id.*

93. *Id.*

94. *Id.* This view, Petitioners claim, is "supported by the Metropolitan Police Department's own regulations generally prohibiting this practice." *Id.*

95. 440 U.S. 648 (1979). In *Delaware v. Prouse*, a police officer in a patrol car stopped an automobile only to check the driver's license registration. Delaware v. Prouse, 440 U.S. 648, 650 (1979). The officer smelled marijuana as he approached the stopped vehicle, and seized the marijuana which was in plain view on the car floor. *Id.* At a hearing on the passenger's motion to suppress the marijuana seized as a result of the stop, the patrolman testified that prior to stopping the vehicle he had not observed any traffic or equipment violations, nor any suspicious activity. *Id.*

96. *Id.* at 659.

97. *Whren*, 116 S. Ct. at 1776. The Court pointed out that the petitioners errantly relied on cases like *Prouse* which "involve[d] police intrusion *without the probable cause that is its traditional justification.*" *Id.* Whereas there was probable cause for the stop in *Whren*.

analysis in search and seizure cases when the actions of officers are out of the ordinary and "unusually harmful to an individual's privacy or even physical interests."[98]

IV. IMPACT

A. PRETEXT IS IRRELEVANT IN TRAFFIC STOPS AND ARRESTS

In *Whren v. United States* the United States Supreme Court held that the Fourth Amendment reasonableness of a traffic stop depends upon what an officer under the same or similar circumstances *could have* done.[99] The impact of *Whren* is that federal courts will have to apply a *could have* standard in determining reasonableness of a traffic stop and seizure under the Fourth Amendment. Furthermore, state courts may have to re-evaluate their standards in pretextual stops following *Whren*. If there is justifiable probable cause to effectuate a traffic stop, any subsequent search and seizure is constitutional notwithstanding what a similar officer would have done or what the arresting officer was thinking.[100] This clarification stabilizes this area of law. This impact creates broad police power to stop motorists and discover evidence not related to the stop. Language concerning pretext and subjective intent of police officers from early Court cases, such as *Lefkowitz*, no longer means much in the context of ordinary probable cause stops and arrests.

B. THE IMPACT OF *WHREN* IN NORTH DAKOTA

Similar to the federal standard, searches and seizures must be reasonable in North Dakota under Article I, Section 8 of the North Dakota Constitution.[101] Under *Whren*, a pretextual traffic stop is reasonable under the Fourth Amendment so long as there is probable cause to stop the motorist for a traffic violation.[102] A new question arises as to

98. *Id.* (citing Tennessee v. Garner, 471 U.S. 1 (1985), which discussed seizure by means of deadly force). In *Garner*, a Memphis, Tennessee police officer shot and killed a 15 year old boy after reporting to the scene of a burglary and seeing the youth fleeing over a fence. *Garner*, 471 U.S. at 3-4. The police officer was acting according to police procedures and pursuant to statutory authority. *Id.* at 4. The Court went on to say that in order "[t]o determine the constitutionality of a seizure '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Id.* at 8 (quoting United States v. Place, 462 U.S. 696, 703 (1983)). For other examples see *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995) (holding that an unannounced entry of a home is unreasonable), *Winston v. Lee*, 470 U.S. 753 (1985) (holding that a physical penetration of the body is unreasonable), and *Welsh v. Wisconsin*, 466 U.S. 740 (1984) (holding that a warrantless entry into a home is unreasonable).

99. *Whren*, 116 S. Ct. at 1774.

100. *Id.*

101. N.D. CONST. art. I, § 8. The North Dakota Supreme Court has observed that "[t]he fourth and fourteenth amendments to the United States Constitution and Article 1, § 18(sic) of the North Dakota Constitution prohibit unreasonable searches and seizures." State v. Phelps, 286 N.W.2d 472, 475 (N.D. 1979).

102. *Whren*, 116 S. Ct. at 1777.

whether the North Dakota Constitution will provide more protection against pretextual stops.

The first North Dakota case to deal with the issue of pretextual arrests was *State v. Riedinger*.[103] In *Riedinger*, the North Dakota Supreme Court followed the United States Supreme Court's decision in *Scott v. United States* and held that the constitutionality of an arrest under the Fourth Amendment should be resolved by objective standards.[104] The North Dakota Supreme Court further stated that its holding did not mean that motive or intent of police officers would never be relevant in determining whether a search and seizure is legal.[105] Rather, the court felt that a case-by-case analysis would be necessary to determine whether a Fourth Amendment violation had occurred.[106]

Furthermore, the court in *Riedinger* opined that even though there was not sufficient probable cause for the officers involved to search the premises in question, there was *reasonable suspicion*.[107] While probable cause and reasonable suspicion have similar definitions,[108] the North Dakota Supreme Court indicated that probable cause is a higher standard.[109]

103. 374 N.W.2d 866 (1985). The North Dakota Supreme Court stated that while some courts have "analyzed search and seizure issues in terms of the underlying motive or intent of the officers involved, this Court has not directly dealt with the matter." State v. Riedinger, 374 N.W.2d 866, 871 (1985). The main issue in *Riedinger* was whether a stolen microwave discovered during a valid search for drugs and money should be suppressed as not within the "plain view" exception to the constitution's warrant clause. *Id.* at 868.

104. *Riedinger*, 374 N.W.2d at 871-72 (citing Scott v. United States, 436 U.S. 128, 137-38 (1978), State v. Bruzzese, 463 A.2d 320 (N.J. 1983), and 1 LAFAVE, SEARCH AND SEIZURE, § 1.2, at 47 (Supp. 1985)); *see also* State v. Smith, 452 N.W.2d 86, 88 (N.D. 1990) (holding that the standard for North Dakota is "an objective one"). The North Dakota Supreme Court has also stated that "[t]he trier of fact must use an objective standard and determine whether or not a reasonable person in the officer's position would be justified by some objective manifestation to suspect the defendant was, or was about to be, engaged in criminal activity." Zimmerman v. North Dakota Dep't of Transp. Dir., 543 N.W.2d 479, 481 (N.D. 1996) (citing State v. Sarhegyi, 492 N.W.2d 284, 286 (N.D. 1992)).

105. *Riedinger*, 374 N.W.2d at 872.

106. *Id.*

107. *Id.* (emphasis added). The court noted that "despite the fact that the officers' suspicions had some real basis, a specific search for stolen goods was not authorized, perhaps because [the officers] had not yet attained the necessary degree of certainty for probable cause, or because they were unable to obtain complete information before seeking the initial warrant." *Id.*

108. In the context of searches and seizures,

> Probable cause to arrest exists where facts and circumstances within officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been or is being committed; it is not necessary that the officer possess knowledge of facts sufficient to establish guilt, but *more than mere suspicion is required.*

BLACK'S LAW DICTIONARY 1201 (6th ed. 1990) (emphasis added). Reasonable suspicion, on the other hand, is "[s]uch suspicion which will justify [an] officer, for Fourth Amendment purposes, in stopping [a] defendant in [a] public place is [the] quantum of knowledge sufficient to induce an ordinarily prudent and cautious man under [the] circumstances to believe criminal activity is at hand." *Id.* at 1266.

109. *Riedinger*, 374 N.W.2d at 872 (stating that even if there were no probable cause, reasonable suspicion was sufficient in the circumstances before the court). The North Dakota Supreme Court has other times distinguished between the reasonable suspicion standard and the

Reasonable suspicion was again analyzed in *Bismarck v. Uhden*.[110] In *Uhden*, the North Dakota Supreme Court allowed non-probable cause stops at a police checkpoint.[111] The North Dakota court addressed the issue of whether a North Dakota statute allowing police to stop and question individuals with less than probable cause applied to motor vehicle stops.[112] Even though the stop in question in *Uhden* was not one listed in the statute, the North Dakota Supreme Court allowed the less than probable cause stop and arrest.[113]

Recently, the pretext issue was revisited in *Zimmerman v. North Dakota Department of Transportation Director*,[114] where the North Dakota Supreme Court held that to make a valid stop the officer must have "a reasonable and articulable suspicion" that there has been a violation by the motorist.[115] The court stated that for a valid investigative stop, a police officer must have "a reasonable and articulable suspicion" that there has been a violation of the law.[116] The court held that the officer in *Zimmerman* did have reasonable suspicion to stop

probable cause standard when it stated that "the information used to support an investigative stop need not support 'the more exacting standard of probable cause necessary to make an arrest.'" Loralyn Eckelberg Clark, Comment, *Is "Reasonable Suspicion" Becoming "Probable Cause"?: State v. Sarhegyi*, 69 N.D. L. REV. 999, 1002 (1993) (quoting Wibben v. North Dakota State Highway Comm'r, 413 N.W.2d 329, 331 (1987)).

It may be that the North Dakota Supreme Court established a standard lower than the one applied in *Whren*. It appears that an officer in North Dakota may stop and arrest based only on reasonable suspicion. This conflicts with the United States Supreme Court's ruling in *Whren*, which requires at least probable cause. Interview with Thomas Lockney, Professor of Law, University of North Dakota School of Law, in Grand Forks, N.D. (Oct. 8, 1996). This is a potential problem for North Dakota. *Id.*

110. 513 N.W.2d 373 (N.D. 1994).

111. Bismarck v. Uhden, 513 N.W.2d 373, 376 (N.D. 1994). Uhden was riding a motorcycle and was stopped at a sobriety checkpoint. *Id.* at 374. Uhden was not observed violating any traffic laws and was not otherwise driving erratically. *Id.* The officers at the sobriety stop noticed that Uhden was intoxicated and he was arrested for DUI. *Id.*

112. *Id.* at 375. Section 29-29-21 of the North Dakota Century Code allows stops in public places if a peace officer reasonably suspects a person is "committing, has committed, or is about to commit . . . any felony[,] . . . [a] misdemeanor relating to the possession of a concealed or dangerous weapon or weapons[,] . . . [b]urglary or unlawful entry[,] . . . [or a] violation of any provision relating to possession of marijuana or of a narcotic, hallucinogenic, depressant, or stimulant drugs." *Id.*

Section 29-29-21 of the North Dakota Century Code was passed in response to a United States Supreme Court decision. *See Uhden*, 513 N.W.2d at 376 (citing Terry v. Ohio, 392 U.S. 1, 22 (1968)). In *Uhden*, the North Dakota Supreme Court stated that the statute was passed "apparently in light of *Terry*." *Id.* The court also reiterated the *Terry* standard: "It is reasonable in appropriate circumstances to investigate criminal activity without probable cause." *Id.* (citation omitted).

113. *Id.* Thus, a statute that was passed by the North Dakota Legislature in response to *Terry*, and established guidelines for an officer to stop and arrest on less than probable cause, was ignored by the North Dakota Supreme Court. *See id.*

114. 543 N.W.2d 479 (1996).

115. Zimmerman v. North Dakota Dep't of Transp. Dir., 543 N.W.2d 479, 481 (1996) (stating the issue as whether the arresting officers' observations provided a valid basis for the stop); *see also* Moran v. North Dakota Dep't of Transp., 543 N.W.2d 767, 769 (1996) (stating that the issue was whether there was justification for the stop by police). The court stated that for a valid investigative stop, a police officer must have "a reasonable and articulable suspicion" that there has been a violation of the law. *Zimmerman*, 543 N.W.2d at at 481.

116. *Id.*

Zimmerman because he had crossed the center line.[117] The court further stated that it is well settled that traffic violations, "even those considered common or minor," are prohibited and give officers the requisite amount of suspicion to effectuate a stop for purposes of investigation.[118]

Zimmerman contended that the traffic violation for crossing the line cannot be used as the basis of an investigative stop because the officer testified that she stopped the vehicle only because another officer told her to, and not because of the traffic violation.[119] The court stated that they had resolved a similar issue in *State v. Smith*,[120] which dealt with the investigation of a possible open container violation.[121] The court found the stop to be valid even though the officer's articulated reason was insufficient, since the officer had observed other violations which provided him with "reasonable cause" to stop the vehicle to issue a citation.[122]

It appears that North Dakota's standard in pretext cases of *reasonable suspicion* as applied in *Riedinger*, or *reasonable cause* as applied in *Zimmerman*, is inconsistent with the United States Supreme Court's standard of *probable cause* as required by Whren. Today in North Dakota, the standard applied in pretextual stop and arrest cases is too low. While the North Dakota Supreme Court may disregard *Whren*, the court should re-evaluate its standard in pretext cases and elevate the standard to probable cause.

Anthony J. Weiler[123]

117. *Id.* at 482. The court found the stop to be reasonable even though Officer Sampers testified that the road was compacted with snow and ice and she could only "tell approximately" where the center line was. *Id.* at 481.

118. *Id.* at 482 (citations omitted).

119. *Id.* In *Zimmerman*, Jamestown Police Officer Jay Gruebele observed Zimmerman's car parked in an alley in downtown Jamestown, North Dakota. *Id.* at 480. The vehicle remained parked in the alley and officer Gruebele noticed someone get out of the vehicle and walk away. *Id.* Gruebele approached the car on foot to give the driver a warning citation for illegal parking, and as he approached, the vehicle drove away. *Id.* Officer Cindy Sampers was in the vicinity and began following Zimmerman's vehicle. *Id.* Gruebele followed in his squad car and because he was suspicious that there may have been illegal activity going on in the alley, he radioed Sampers to stop Zimmerman's car. *Id.* Sampers followed Zimmerman and just before she executed the stop she noticed Zimmerman "cross the center line once." *Id.* Sampers testified that although this crossing of the center line constituted a traffic violation, "she stopped Zimmerman because Officer Gruebele had directed her to do so, not for the violation." *Id.* Zimmerman was arrested for Driving Under the Influence. *Id.*

120. 452 N.W.2d 86 (N.D. 1990).

121. *Zimmerman*, 543 N.W.2d at 482 (citing State v. Smith, 452 N.W.2d 86, 89 (N.D. 1990)).

122. *Id.* (citing *Smith*, 452 N.W.2d at 89). In *Smith*, the court utilized the language "probable cause" which adds more confusion to the issue. *See Smith*, 452 N.W.2d at 89. The court provides no other more explicit language to indicate which standard a North Dakota police officer is judged by.

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